Supreme Court, U.S.
FILED

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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1999

GEORGE L. MOTHERSHED,
PETITIONER

On Writ of Certiorari to the United States District Court for the Western District of Oklahoma or, alternatively, the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

GEORGE L. MOTHERSHED
Petitoner

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QUESTION PRESENTED FOR REVIEW

Whether, in light of *Lexecon v. Milberg Weiss Bershad Hanes & Lerach*, 523 U.S. 26, 118 S.Ct. 2368, 140 L.Ed2d 62, 98 Daily Journal D.A.R. 2041 (1998) and *B.B. Rogers Processors, Inc. v. BOC Group, Inc.*, ___ U.S. ___, 118 S.Ct. 2368, 141L.Ed.2d 732 (1998), the United States District Court for the Western District of Oklahoma erred in a summary denial of a motion to retransfer the underlying action to the United States District Court for the Central District of California, over Petitioner's timely objection and Fed.R.Civ.P., 60(b) motion to vacate, when the case originally had been transferred to that district without evidence.

PARTIES TO THE PROCEEDING

In addition to the party named in the caption, the following were parties to the action below: Gerald E. Durbin, III; Helen J. Crawford Zajick; Luther B. Eubanks; DURBIN, LARIMORE & BIALICK, a professional corporation; Mark E. Bialick; Elizabeth Nevett Sloan; Gary L. Brooks; and Carroll E. Gregg.

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CERTIORARI SHOULD BE GRANTED PURSUANT TO RULE 10 BECAUSE THE DECISIONS OF THE DISTRICT COURT AND THE REFUSAL OF THE CIRCUIT COURT TO REVERSE ADDRESSES AN IMPORTANT FEDERAL QUESTION IN A MATTER INCONSISTENT WITH A RELEVANT DECISION OF THIS COURT 4-6

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Petitioner, George L. Mothershed respectfully petitions this Court to issue a writ of certiorari to review the March 2, 1999 order (App. 7a) of the United States District Court for the Western District of Oklahoma in favor of the Respondents.

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit refused to assume jurisdiction denying the issuance of a writ of mandamus over the United Stated District Court for the Western District of Oklahoma. This two judge decision was denied rehearing by the full Circuit Court upon petition for rehearing on July 21, 1999. None of these decisions is reported. The unpublished orders of the United States District Court for the Western District of Oklahoma and the Tenth Circuit are included in the appendix to this petition along with the order of the United States District Court for the Central District of California. Without supporting evidence upon its own motion the United States District Court for the Central District of California under putative authority of 28 U.S.C. § 1404(a) to the United States District Court for the Western District of Oklahoma.

STATEMENT OF JURISDICTION

The Court of Appeals entered its order on May 14, 1999, and denied rehearing on July 21, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision involved in this petition is 28 U.S.C. § 1404(a) which provides in pertinent part:

> (a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any

civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

A. Introduction

This is a civil Racketeering Influenced Corrupt Practices Act, 18 U.S.C. §§ 1961-1968 ("RICO") action initiated by Petitioner in the United States District Court for the Central District of California. The Respondents, it is alleged engaged in a pattern of racketeering activities in interstate commerce against Petitioner. One Respondent is a resident, does business and was served in California and the remaining Respondents are residents, do business and were served in Oklahoma.

B. Prior Proceedings in this Case.

1. Factual Background

Petitioner initiated a RICO action in the United States District Court for the Central District of California in July 1994. Citing 28 U.S.C. § 1404(a) as authority the California District upon its own motion without supporting evidence for the transfer ordered (App. 4a-5a) the action transferred to the Western District of Oklahoma. Petitioner timely sough the action to be re-transferred to the Central District of California which was denied by the Oklahoma Court. Also, Petitioner timely sought writ of mandamus from the Ninth Circuit which was also denied.

Upon the announcement of the decisions *Lexecon v. Milberg Weiss Bershad Hanes & Lerach*, 523 U.S 26, 118 S.Ct. 2368, 140 L.Ed2d 62, 98 Daily Journal D.A.R. 2041 (1998) and *B.B. Rogers Processors, Inc. v. BOC Group, Inc.*, ___ U.S. ___, 118 S.Ct. 2368, 141L.Ed.2d 732 (1998) by this Court Petitioner sought a Federal Rules of Civil Procedure("Fed.R.Civ.P."), Rule

60(b) post judgment motion to vacate the Oklahoma District Court's dismissal of the RICO action and the re-transfer to the Central District of California.

2. The Decision of the Oklahoma District Court

Petitioner seeks review by this Court of the Oklahoma District Court' s decision to keep this case for trial and the subsequent decision refusing to vacate an order of its dismissal and refusal to re-transfer to California.

Petitioner's Fed.R.Civ.P. 60(b) motion to vacate is timely because an invalid 28 U.S.C. § 1404(a) transfer order is never n repose but always remains subject to attack. *Hoffman v. Blaski*, 363 U.S. 340, fn 9, 80 S. Ct. 1084, 4 L.Ed. 2d 1254 (1960). A change in relevant Supreme Court case law warrants relief under Fed.R.Civ.P. 60(b)(6). *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989). The Oklahoma Court refused to address the merits of new law announced in *Lexecon v. Milberg Weiss Bershad Hanes & Lerach* and *B.B. Rogers Processors, Inc. v. BOC Group, Inc.*

Through failure to review the Oklahoma District Court's refusal to vacate and retransfer to the Central District of California is inconsistent with *Lexecon v. Milberg Weiss Bershad Hanes & Lerach* and *B.B. Rogers Processors, Inc. v. BOC Group, Inc.*

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED PURSUANT TO RULE 10 BECAUSE THE DECISIONS OF THE DISTRICT COURT AND THE REFUSAL OF THE CIRCUIT COURT TO REVERSE ADDRESSES AN IMPORTANT FEDERAL QUESTION IN A MATTER INCONSISTENT WITH A RELEVANT DECISION OF THIS COURT.

In the instant action the California District Court has acted in a manner which is inconsistent with *Lexecon v. Milberg Weiss Bershad Hanes & Lerach*, 523 U.S. 26, 118 S.Ct. 2365, 140 L.Ed.2d 732 (1998). Specifically, "[T]here is no reason why courts should be equally bound by a venue statute that just as categorically limits the authority of courts (and special panels) to override plaintiff's choice [of forum]. If the former statute [28 U.S.C. 1391] creates aes interests to substantial to be denied without a remedy, the latter statute [28 U.S.C. 1404(a)] ought to be recognized as creating interest equally substantial. In each instance the substantially of the protected interest is attested by a congressional judgment that in the circumstance described in the statute no discretion is to be left to a court faced with a statutory violation. To render relief discretionary in either instance would be to allow uncorrected defiance of a categorical congressional judgment to become its own justification."

In the instant action a RICO special venue statute of 18 U.S.C. §§ 1965(a), (c), and (d) creates an interest "too substantial to be denied without a remedy" for Petitioner. The discretionary California District Court Order Transferring Action (App. 4a-5a) is an instance of a violation of Petitioner's protected interest in selecting a forum of his choice. It is also where no discretion is to be left to the California Court because it is a violation of the RICO special venue statute and defiance of " a congressional judgment to be its own justification." Therefore to protect Petitioner's substantial statutory interest in

litigating in the California forum of his choice and recognizing the California Court's statutory venue violation in entering the Order Transferring Action (App. 4a-5a), the Oklahoma District Court should have vacated all of its prior orders and re-transferred the action to California.

Petitioner timely raised the issue of wrongful transfer of venue in both the California and Oklahoma District Courts, also in the Ninth Circuit and Tenth Circuit, all to no avail. The Oklahoma District Court ignored and refused to apply the rule of law announced in *Lexecon v. Milberg Weiss Bershad Hanes & Lerach*. The Oklahoma District Court never had jurisdiction or authority to do anything except the re-transfer of the case and its files to the California District Court.

Petitioner sought review of the Oklahoma District Court's decision by writ of mandamus to the Tenth Circuit. That Court denied saying Petitioner "had not demonstrated that the original 1404(a) transfer or the district court's denial of his Rule 60(b) motion is a clear abuse of discretion." (App. 3a)

However, upon a Petition for Rehearing en Banc demonstrating an undeniable abuse of discretion because the Order Transferring Action lacks supporting evidence and is an exercise in excess of granted congressional authority. The Court responded showing as grounds for denial of reconsideration was the Tenth Circuit's general apathy or indifference toward the issue.

Petitioner has raised the issue in four separate courts upon six different occasions. None of them seek to address the issue in any fashion, other than a general denial of the requested relief. The holding in *Lexecon v. Milberg Weiss Bershad Hanes & Lerach* directly supports the arguments Petitioner has made in the Courts below.

Issuance of a writ of certiorari is appropriate to correct

the erroneous ruling of the Court of Appeals, which is in direct conflict with this Court's holding in *Lexecon v. Milberg Weiss Bershad Hanes & Lerach*. This Court should grant certiorari in this case and summarily vacate all orders of the United States District Court for the Western District of Oklahoma and remand this case to the United States District Court for the Central District of California. In the alternative, this Court should remand this case to the Tenth Circuit, with instructions that it reconsider its rulings in light of this Court's opinion in *Lexecon*.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1999 TERM

GEORGE L. MOTHERSHED,
PETITIONER.

PETITIONER'S APPENDIX

To Writ of Certiorari to the United States District Court for the Western District of Oklahoma or, alternatively, the United States Court of Appeals for the Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re:

GEORGE L. MOTHERSHED, No.99-6166

Petitioner.

ORDER

Filed: July 21, 1999

Before **PORFILIO and BRORBY,** Circuit Judges.

Petitioner's petition for rehearing is denied by the panel that rendered the decision. The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P.35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re:

GEORGE L. MOTHERSHED,

-Petitioner.No. 99-6166

ORDER
Filed May 14, 1999

Before **PORFILIO** and **BRORBY,** Circuit Judges.

This is an original proceeding in the nature of mandamus. George L. Mothershed seeks an order from this court directing the district court to grant his postjudgment motion filed pursuant to Fed. R. Civ. P.60(b). In that motion, petitioner requested the district court to vacate its dismissal of his lawsuit, reinstate the complaint, and retransfer the case back to the Central District of California. He contends that the original transfer of the case to the United States District Court for the District of Western Oklahoma pursuant to 28 U.S.C. § 1404(a) was invalid and that the district court's denials of his requests to retransfer the case are an abuse of power and contrary to recent Supreme Court authority in *Lexecon Inc. V. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998).

Our review of petitioner's motion and accompanying documents, in light of the applicable law, convinces us that petitioner has not shown a clear and indisputable right to the extraordinary relief of mandamus. *See Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980); *Weston V. Mann (In re Weston),* 18 F.3d 860, 864 (10th Cir. 1994). He has not demon

strated that either the original § 1404(a) transfer or the district court's denial of his Rule 60(b) motion is a clear abuse of discretion. *See Pacificare of Okia., Inc. v. Burrage*, 59 F.3d 151, 153 (10th Cir. 1995).

Entered for the Court PATRICK FISHER, Clerk

Deputy Clerk
By

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEORGE L. MOTHERSHED,

Plaintiff, CASE NO. CV 94-5082-RMT(Bx)

vs.

GERALD E. DURBIN, et al.,

ORDER TRANSFERRING ACTION

Defendants

FILED February 24, 1995

This matter having come before the court on the motion by defendants GERALD E. DURBIN, II; HELEN J. CRAWFORD (A.K.A. HELEN J. ZAJICK); LUTHER B. EUBANKS; DURBIN, LARIMORE & BIALICK, A professional corporation; MARK E. BIALICK; ELIZABETH J. NEVITT; GARY L. BROOKS; AND CARROLL E. GREGG, to dismiss, or in the alternative, transfer to the United States District Court for the Western District of Oklahoma, and the court having considered the pleadings and other documents filed herein and determined the following:

1. For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. S 1404(a); See, Van Dusen V. Barrack, 376 U.S. 612 (1964) (The purpose of Section 1404 is to prevent the waste of time and money; and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.);

2. Only one defendant and possibly one witness is located in the Central District of California. The plaintiff is located in the State of Arizona and all remaining defendants are located in the Western

District of Oklahoma; and

3. This court chooses not to rule on defendants' motion to dismiss because the history of litigation between the parties strongly suggests that the interests of justice would be best served by transferring this action to the Western District of Oklahoma where the court is familiar with the numerous prior suits that have been filed, the evidence related thereto, and the results thereof,

IT IS ORDERED that this action be transferred to the United States District Court for the Western District of Oklahoma.

ROBERT N. TAKASUGI
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF OKLAHOMA

FILED MARCH 2, 1999

GEORGE L. MOTHERSHED,

Plaintiff, No . CIV-95-405-A

v.

GERALD E. DURBIN, II; et al.,

Defendants.

On February 1, 1999, the Court ordered plaintiff, George L. Mothershed to show cause why he should not be held in contempt for violating an injunction against his "reasserting in this or any other district court any further claims arising from the factual allegations of the complaint." (Order of May 26, 1995, at 7.) The alleged violation consists of plaintiff's filing in this case on January 11, 1999 a motion for relief from a part of the May 1995 Order that this Court dismissed frivolous claims. Plaintiff seeks by his motion to vacate the dismissal to reinstate the complaint, and to transfer the case to the Central District of California (its point of origin more than four years ago).

Mr. Mothershed responded to the show cause order with a written submission in which he simply denies the clear import of his Rule 60(b) motion and reiterates the arguments in it, namely, that the original transfer or the case to this district under 28 U.S.C.§ 1404 (a) was improper under recent Supreme Court precedent.

Plaintiff likens his filing of the current motion to conduct in 1995 when he attempted to file additional papers in the California district court. Defendants moved for a contempt citation at that tile, but the Court denied the motion, finding that the conduct then in question did not amount to further reassertion of claims. Plaintiff argues that then, as now he is simply attempting to change an unfavorable outcome in this case, *but* not to

reassert his claims.[1] Plaintiff argues that then, as now, he is simply attempting "change an unfavorable outcome in this case," bun not to reassert his claims.

While the Court is not convinced by this argument, it does find that the October 1995 Order clouded the issue of what Conduct would violate the May 1999 injunction. Consequently, the Court will not impose a sanction this time. It will, however, reiterate its prohibition and put Mr. Mothershed on notice that he will be sanctioned in the event of a future violation.

IT IS THEREFORE ORDERED Mr. Mothershed is hereby enjoined from making any further filings in this case or any other case, before this court or any other court that would have effect of pursuing claims against the defendants based on the factual allegations of the complaint. His motion for Relief from Order and for Retransfer, filed January 11, 1999, is DENIED as frivolous.

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[1]Specifically, the Court stated:

> It is not clear that the allegedly contemptous conduct violates the injunction imposed by the Court's May 26 order. Mr. Mothershed attempted to file additional papers in the United States *District* Court for the Central *District of* California in a case file that was closed due to the case's transfer to this district. Those papers were either refused or stricken, and Mr. Mothershed then petitioned the Ninth Circuit for a writ of mandamus. His efforts were designed to relitigate the issue of whether this case was properly transferred here from California. They constitute an attempt to change the unfavorable outcome in this case but not a reassertion of further claims. (Order of Oct. 11, 1995 at 1-2.)

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